No. 77-1627

Supreme Court, U. S.
FILED
MAY 16 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

HELENA McCOY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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INDEX

PAGE

Opinion 1

Jurisdiction 1

Question Presented 2

Constitutional Provision Involved 2

Statement of the Case 3

Statement of Facts 4

Reasons for Granting the Writ 7

1. The decision below raises significant and recurring problems concerning the duty of a trial court to conduct careful inquiry into the objections of an accused who is forced into representation by counsel not of his own choosing 7

Conclusion 11

Appendix A—Opinion of the Court of Appeals for the Tenth Circuit dated March 10, 1978 .....App. 1

Appendix B—Order denying Petition for Rehearing and Suggestion for Rehearing En Banc dated April 17, 1978 .....App. 7

Appendix C—Order recalling and staying mandate pending application for certiorari dated May 10, 1978 .....App. 9

AUTHORITIES CITED

Cases

	PAGE
Brown v. United States, 264 F.2d 363 (D.C.Cir.) *cert. den.* 360 U.S. 911 (1958)	8
United States v. Bernstein, 533 F.2d 775 (2 Cir. 1976)	7
United States v. Seale, 461 F.2d 345 (7 Cir. 1972)	8

Constitution

United States Constitution, Sixth Amendment	2, 10

Other Authorities

Federal Rules of Criminal Procedure, Rule 11	9
Federal Rules of Appellate Procedure, Rule 40	3
Federal Rules of Appellate Procedure, Rule 41(b)	3

In the Supreme Court of the United States

OCTOBER TERM, 1977

NO

HELENA McCOY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner, Helena McCoy, prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINION BELOW

The published opinion of the Court of Appeals is appended to this Petition as Appendix A.

JURISDICTION

The opinion of the Court of Appeals was entered on March 10, 1978. Thereafter, Petitioner's Petition for Re-

hearing and Suggestion for Rehearing *En Banc,* timely filed, was denied on April 17, 1978, pursuant to an order which is appended to this Petition as Appendix B. Subsequently, on April 24, 1978, Petitioner moved the Tenth Circuit for a stay of the mandate pending application for certiorari pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure and Tenth Circuit Rule 17, requiring that the movant make a showing of probable cause to believe that a Petition for Certiorari will not be frivolous or filed merely for delay. On May 10, 1978, the Tenth Circuit entered an order, so staying the mandate. This order is appended hereto as Appendix C. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1) and Rule 22.2 of the Rules of this Court.

QUESTION PRESENTED

Whether the decision of the Court of Appeals, in condoning through affirmance the trial Court's abdication of its duty to an accused to conduct a careful inquiry into objections to forced representation by an attorney with a professed conflict of interest at the time of her plea, after unexpectedly finding herself without chosen trial counsel, established a dangerous precedent, in derogation of the accused's Sixth Amendment right to the effective assistance of counsel?

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

STATEMENT OF THE CASE

Petitioner, Helena McCoy, together with seven (7) co-defendants, was indicted by a Federal Grand Jury in Albuquerque, New Mexico, in one count, charging a conspiracy to distribute marijuana (C.1). Thereafter, on April 8, 1977, the trial Court accepted a plea of nolo contendere to this indictment (R. 9). Subsequently, on May 13, 1977, judgment was entered on the plea and Petitioner was sentenced to a term of three (3) years imprisonment, followed by a special parole term of five (5) years and received a fine of fifteen thousand dollars ($15,000.00). From this judgment and sentence, Petitioner filed timely notice of appeal on May 19, 1977.

On March 10, 1978, the United States Court of Appeals for the Tenth Circuit entered an order, affirming Petitioner's conviction. Thereafter, on March 24, 1978, Petitioner, pursuant to Rule 40 of the Federal Rules of Appellate Procedure, timely filed a Petition for Rehearing with En Banc Suggestion. Subsequently, on April 17, 1978, the Court of Appeals entered an order, denying Petitioner's Petition for Rehearing with En Banc Suggestion. Ultimately, on May 10, 1978, the Court of Appeals granted Petitioner's motion pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, staying the mandate pending application for certiorari.

Petitioner currently is enlarged on bond pending the disposition of the instant Petition.

STATEMENT OF FACTS

As stated above, Petitioner, together with seven (7) defendants, was indicted in one count, charging a conspiracy to distribute marijuana (C. 1). As a result thereof, Petitioner contacted and retained her present counsel, Edward M. Genson of Chicago, Illinois, to represent her as trial counsel in the criminal proceedings related to this indictment. In addition thereto, Petitioner contacted and retained Attorney Samuel A. Francis of Albuquerque, New Mexico, to act solely as local counsel, facilitating the filing of motions and representing Petitioner in preliminary matters to the trial of the case (C. 28). It is important to note in this regard that Attorney Francis, in addition to acting as local counsel for Petitioner, was counsel of record for a co-defendant Charles Doll Sullivan.

The case came on for trial before the Honorable Edwin L. Meecham, on April 6, 1977, at which time Petitioner's trial attorney, Edward M. Genson, was present to represent her. In addition, Attorney Francis was present, then still acting as local counsel for Petitioner and as counsel for co-defendant Sullivan. At this time, a jury was selected and sworn (C. 28).

Thereafter, on the very evening after the jury was selected and sworn, Petitioner's trial counsel, Edward M. Genson, became seriously ill to the extent that he was prevented from appearing at the criminal proceedings of the next day (R. 5). For this reason, local counsel Sam Francis was required to perform the dual representation of Petitioner and co-defendant Sullivan at the proceedings below.

On the next day, Petitioner was advised by local counsel Francis of the intention of the prosecution to move the

trial Court to have the trial proceed without Petitioner's trial attorney, Edward M. Genson. Mr. Francis further advised Petitioner that if she decided to proceed to trial, she would have to be represented by local counsel, rather than the counsel of her choice, Edward M. Genson (R. 4, 5).

Additionally, Mr. Francis stated on the record that his client, co-defendant Sullivan, was, as part of certain plea negotiations, to cooperate with the prosecution in exchange for leniency on a plea of guilty. Such cooperation was to include the testimony of co-defendant Sullivan as a witness on behalf of the Government against Petitioner herein (R. 3, 4).

In light of his present physical condition, and his present inability to represent Petitioner at trial on the next day, Petitioner's trial counsel advised Petitioner to consider a plea of nolo contendere pursuant to certain plea negotiations with the Government.

On April 8, 1977, Petitioner appeared before trial Court being represented by local counsel Francis. At this proceeding, Attorney Francis advised the Court that Petitioner's trial attorney, Edward M. Genson, was hospitalized and requested a continuance for the purposes of allowing Petitioner to be represented by the trial counsel of her own choice. In so advising, the following colloquy ensued between Attorney Francis and the trial Court:

> "Mr. Francis: I have not been conferring with her (petitioner) at all since it was discovered, when my client, Mr. Sullivan, decided to enter a plea, and we found that the Government was going to subpoena my client to testify on behalf of the Government, so I've not been conferring with Ms. McCoy since that time. I feel that because there is a probable conflict there, I would also ask the Court to let Mr. Genson handle the plea for her on Monday. (This was a Friday).

> The Court: Is he sure he will be able to appear here on Monday? . . . My only problem is, I'm holding this jury simply for the purpose of hearing this matter, and I hate like everything to hold them over until Monday, Mr. Francis, if there is any way I could avoid it . . . This is the difficulty I am running into and it makes it more of a problem to close this thing out." (R. 3, 4)

Thus, in addition to requesting a one-day continuance, Attorney Francis flatly professed a conflict of interest in his representation of both Petitioner and co-defendant Sullivan at that time, as it was Sullivan's intention to testify on behalf of the Government, implicating Petitioner, should the matter proceed to trial.

After this colloquy, and more importantly, Petitioner herself informed the trial court that although she realized it would be inconvenient to adjourn the proceedings until the following Monday, it was her express desire to have her own counsel represent, stating:

> "Your Honor, I realize it is inconvenient to hold this up, but I would rather have my *own* counsel enter my plea. . ." (emphasis added) (R. 5).

Notwithstanding Attorney Francis' professed conflict of interest, Attorney Francis' admission that he had not been conferring with Petitioner and Petitioner's express request to have her own counsel represent her, the trial court denied a continuance and proceeded to take Petitioner's plea of nolo contendere without further inquiry.

REASONS FOR GRANTING THE WRIT

1. The decision below raises significant and recurring problems concerning the duty of a trial Court to conduct careful inquiry into the objections of an accused who is forced into representation by counsel not of his own choosing.

Petitioner contends that the trial court abdicated its duty to her when it eschewed careful inquiry into her objections to forced representation by an attorney with a professed conflict of interest at the time of her plea, after unexpectedly finding herself without chosen trial counsel. The Court of Appeals, through affirmance, has either overlooked or misapprehended the state of the law with respect to this very important obligation of the trial court and has established a precedent which will create significant and recurring problems if not rectified.

In *United States* v. *Bernstein,* 533 F.2d 775 (2 Cir., 1976), it was specifically held that the trial court must conduct a "careful inquiry into the possibility of a conflict of interest whenever the same is presented to it." Plainly a strong probability of a conflict of interest was presented to the trial court in this case.

At the time of the proceedings for the taking of Petitioner's plea of nolo contendere, Petitioner's local counsel, Sam Francis, advised the court that Petitioner's trial attorney, Edward M. Genson, was unexpectedly hospitalized and requested a continuance for the purposes of allowing Petitioner to be represented by the trial counsel of her own choice.

In addition to requesting a reasonable continuance for the reason that Petitioner was being denied counsel of her own choice, Attorney Francis flatly professed a conflict of interest in his representation of both Petitioner and co-defendant Sullivan at that time, as it was Sullivan's intention to testify on behalf of the Government, implicating Petitioner, should the matter proceed to trial.

More importantly, Petitioner herself expressly indicated her desire to have her own counsel represent her, stating:

> "Your Honor, I realize it is inconvenient to hold this up, but I would rather have *my own* counsel enter my plea. . ." (R. 5) (emphasis added)

Notwithstanding the request of Attorney Francis for a reasonable continuance and the request of Petitioner to be represented by her own counsel, and the above stated conflict, the trial court denied the continuance and proceeded to take Petitioner's plea of nolo contendere without further inquiry of any sort into the conflict.

As then Circuit Judge Burger explained in his concurring opinion in *Brown* v. *United States,* 264 F.2d 363 (D.C. Cir.) (*en banc*) *cert. den.* 360 U.S. 911 (1958):

> "When, for the first time, an accused makes known to the court in some way that he has a complaint about his counsel, the court must rule on the matter. The reasons are made known to the court, the court may rule without more. If no reasons are stated, the court then has a duty to inquire into the basis of the client's objection to counsel and should withhold the ruling until reasons are made known." *Id.* at 369.

Further, the Seventh Circuit in *United States* v. *Seale,* 461 F.2d 345 (7 Cir., 1972) embraced this duty imposed on the trial court to inquire into the basis for a client's objection to counsel, stating:

> "The Government has cited no authority to show that a trial judge may eschew inquiry into the objections of a defendant who unexpectedly finds himself without chosen trial counsel. If the Sixth Amendment right to the effective assistance of counsel means anything, it certainly means that it is the actual choice of the defendant which deserves consideration . . . the grant of a severance and a reasonable continuance to secure substitute counsel or leave to Seale to represent himself would have permitted the trial to continue promptly and may well have obviated many of the difficulties that later occurred." *Id.* at 258.

In the instant decision by the Court of Appeals, no mention whatsoever was made of this breach of duty by the trial court. The only statement with respect to the requisite "careful inquiry" in such situations relates to a totally different matter. The Court of Appeals, with respect to the trial court's obligation under Rule 11 of the Federal Rules of Criminal Procedure, did state:

> "Before accepting the nolo contendere plea, the trial judge made *inquiry* regarding the voluntariness of the plea, and *carefully* explained the rights being waived by the defendant in her change of plea." (Slip Op., at page App. 4, appended hereto).

Quite obviously, this statement relates only to the admonishment of rights a defendant waives upon changing a plea of not guilty to one of guilty. It in no way embraces the very different situation which obtains when a defendant makes known to the court "in some way" that he has a complaint about his attorney.

The lack of any inquiry whatsoever into the issue of conflict of interest may be plainly illustrated by the fact that the trial court never even asked the Government whether, in fact, they intended to call co-defendant Sullivan, should Petitioner's plea be unaccepted and she proceeds to trial,

notwithstanding the profession by Attorney Francis of a conflict of interest. In fact, the decision fails to take into account the fact that the trial court did not direct a single question to the attorney for the Government, Attorney Francis, or Petitioner with regard to the professed conflict of interest.

Further, the decision completely overlooks or misapprehends the fact that Petitioner affirmatively apprised the trial court of her desire not to proceed with her plea of nolo contendere and of her desire to postpone her plea due to the absence of her trial counsel, Attorney Edward M. Genson.

The decision additionally fails to take note that it was only after the court made clear its intention that it would proceed without regard to Petitioner's desire to have her own counsel present that Petitioner indicated her "willingness" to go along with the trial court. It is quite apparent under these circumstances, however, that this so-called willingness to proceed was a function of Petitioner's perception that the trial court would force her to do so anyway and her fear of angering the trial court at a critical and highly emotional juncture of the criminal proceedings. It should be noted in this regard, that this was the very first instance in which Petitioner was ever before a criminal court.

Moreover, while the decision correctly recognizes the serious nature of the charge that Petitioner was forced to proceed with counsel not of her own choosing in violation of her Sixth Amendment rights, it completely overlooks or misapprehends the reasonableness of Petitioner's request for a continuance, during which time she would be able to more thoroughly discuss her situation with her own counsel. As stated in *Seale, supra,* the many difficulties which have emerged from this case may well have been obviated

if the Court would have granted Petitioner a severance and this very reasonable continuance to permit her own attorney to convalesce or to secure substitute counsel.

Finally, the decision at page 5 of the appendix, makes much of the fact that all co-defendants under the instant indictment intended to change their pleas at the proceeding below. However, the decision fails to take into account the fact that the trial court was free to reject such tendered changes of plea for just such reasons as present themselves in the record below, at which point there would be a trial. It is only through hindsight that a determination that there would be no trial of any kind could be made.

In light of the totality of the foregoing circumstances which presented themselves prior to and during the proceedings below, and the magnitude of importance of the right involved, the decision permitting a trial court to eschew its obligation to conduct the requisite careful inquiry into the objections of the accused indeed creates a dangerous precedent. This situation will likely recur in the future many times and, if trial courts become unmindful of this obligation, an important right will go unprotected.

CONCLUSION

For any and all of the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 77-1468

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

HELENA GUTERMAN McCOY,

Defendant-Appellant.

Appeal from the United States District Court for the District of New Mexico (D.C. No. 76-181-CR)

David N. Williams, Assistant United States Attorney (Victor R. Ortega, United States Attorney, on the brief), for Plaintiff-Appellee.

Jeffrey B. Steinback (Edward M. Genson, on the brief), for Defendant-Appellant.

Before McWILLIAMS, BREITENSTEIN and DOYLE, Circuit Judges.

McWILLIAMS, Circuit Judge.

Helena Gutterman McCoy, along with seven other defendants, was charged by indictment with conspiring to import marijuana into the United States of America from

the Republic of Mexico in violation of 21 U.S.C. § 952(a) and 21 U.S.C. § 960(a)(1). McCoy pleaded not guilty and she and certain of her codefendants stood trial. After the jury had been impaneled, McCoy and her codefendants changed their pleas and the jury was discharged and the Government's witnesses were excused. It would appear that the several changes of plea resulted from plea bargaining. In any event, McCoy tendered a plea of nolo contendere, and the trial court, after extensive questioning of McCoy, accepted the plea. McCoy was later sentenced to a term of three years imprisonment with a special parole term of five years, and the trial court also imposed a fine of $15,000.

Apparently dissatisfied with the sentence thus imposed, counsel promptly filed a notice of appeal. Counsel did not file a motion to correct or reduce sentence as permitted by Fed. R. Crim. P. 35, nor did he file a motion to withdraw the nolo contendere plea on the ground that it was involuntary and for the additional reason that the plea was taken in violation of McCoy's Sixth Amendment right to be represented by counsel of her own choosing. In other words, defense counsel did not afford the trial court the opportunity to correct its own error, if such there be. Rather he immediately filed a notice of appeal, which effectively precluded the trial court from any consideration of the correctness of its sentence or of the issues which counsel asserts here as grounds for withdrawing McCoy's plea of nolo contendere.

As authority for our considering the propriety of the nolo contendere plea without the matter ever having been presented to the trial court, counsel relies on *McCarthy* v. *United States*, 394 U.S. 459 (1969). In *McCarthy* the Supreme Court under its supervisory powers set aside a

plea of guilty and remanded the case so that the defendant could plead anew, and it would appear that the defendant in *McCarthy* did not file with the trial court a motion to withdraw his guilty plea. Under the authority of *McCarthy* we elect to review on its merits McCoy's claim that her nolo contendere plea was taken in violation of her Sixth Amendment right to counsel. However, to us, better practice would dictate that in the instant case McCoy should have first asked the trial court to withdraw her nolo contendere plea. Such request might have been granted, in which event there wouldn't have been the delay necessarily incurred by invoking the appellate process. And if the trial court denied McCoy's request to withdraw her plea, we would then have a record on the matter.

McCoy contends that at the time her nolo contendere plea was tendered, and accepted, she was forced to proceed with counsel not of her own choosing, in violation of her Sixth Amendment right. This is a serious charge, and of course must be examined carefully. In our view, however, the present record does not bear out the claim of counsel.

McCoy at all pertinent times was represented by two attorneys, both of record. One attorney was a resident of Chicago, Illinois, and McCoy's second attorney was local counsel in Albuquerque, New Mexico. Both names, for example, were noted on the several preliminary motions filed on behalf of McCoy. McCoy's local Albuquerque counsel also represented one of McCoy's codefendants. Such fact was known to McCoy. As indicated, the matter came on for trial, and, after the jury was impaneled, and sworn, some last minute plea bargaining ensued. The matter was continued overnight. The intent was that on the following morning McCoy and her codefendants would change their pleas. During the night McCoy's Chicago

counsel became ill to the end that he could not attend the session of court where the several defendants were to change their respective pleas. McCoy was the first to be rearraigned. McCoy's local Albuquerque counsel advised the court of the illness of Chicago counsel, and further advised the court that since he represented a codefendant who was going to change his plea to one of guilty, and that inasmuch as there had been some talk that his client might conceivably be called as a witness against McCoy, should she proceed to trial, he had reservations about his further representing McCoy. The position of the United States was that any change of plea, by either McCoy or her codefendant, should take place then, or the matter should proceed to trial. McCoy herself initially indicated that she would like the matter to go over a day or two, so that her Chicago counsel, assuming his recovery from his illness, could be with her when she changed her plea. The trial judge indicated that he would like to have the matter resolved, one way or the other, at that time.

It was in this general setting that both McCoy and her local Albuquerque counsel agreed to go forward. Specifically, the trial judge asked McCoy if it was satisfactory to her that she be represented by the local Albuquerque attorney at the change of plea hearing, to which inquiry McCoy responded unequivocally in the affirmative. It was only after receiving this assurance from McCoy herself, that the trial court went forward with the rearraignment process. Before accepting the nolo contendere plea the trial judge made inquiry regarding the voluntariness of the plea, and carefully explained the rights being waived by the defendant in her change of plea. The trial judge also determined that there was indeed a very real basis in fact for the entry of a nolo contendere plea.

Recapitulating, then, McCoy was represented at her rearraignment by local Albuquerque counsel, who was one of her two counsel of record. The claim of a conflict of interest on the part of local Albuquerque counsel was just that, a claim. It is clear that all defendants, including McCoy, were changing their pleas, and that there was not going to be any trial. Indeed, McCoy was the first defendant to be rearraigned. The trial court granted McCoy's request to be permitted to plead nolo contendere, whereas the other defendants entered an outright plea of guilty. Also, at the time of sentencing, which occurred some weeks after her rearraignment, neither McCoy nor her counsel, an associate of McCoy's Chicago counsel who now represents her on appeal, gave any indication that they did not want to persist in the nolo contendere plea. Indeed, even after sentence was imposed, there was no indication of dissatisfaction with any action of the trial court. There was only a request that McCoy be granted three weeks before she be required to surrender to the Marshall. This request was granted. One week later a notice of appeal was filed. On such state of the record we fail to find a denial of McCoy's right to be represented by counsel of her own choosing. Nor does the record support a claim of conflict of interest on the part of McCoy's counsel. Codefendants may have effective representation by a single attorney under circumstances that negative any conflict of interest, and the matter should be considered "under the totality of the circumstances that prevailed during all the pre-trial and trial proceedings." *McHenry* v. *United States*, 420 F.2d 927 (10th Cir. 1970).

As mentioned earlier, McCoy was sentenced to a term of three years imprisonment with a special parole term of five years, and a fine of $15,000. As a part of this appeal McCoy complains about the sentence thus imposed. In

this regard it would appear, assuming the accuracy of the transcript, that before accepting McCoy's plea of nolo contendere the trial court advised her that under the applicable statute she could be imprisoned up to five years, fined up to $15,000, and given a special parole term of *two* years. In the latter connection the trial court imposed a special parole term of *five* years. The record before us does not explain why the trial court referred to a special parole term of two years in accepting McCoy's plea of nolo contendere, and then a few weeks later imposed a special parole term of five years. Perhaps there is an explanation. In any event, the matter can no doubt be cleared up by McCoy's filing a motion to correct or reduce sentence within 120 days after remand. Fed. P. Crim. P. 35.

In connection with her sentence McCoy also complains that she should have been sentenced under the provisions of the general conspiracy statute, 18 U.S.C. § 371. We do not agree. The present prosecution was not brought under that section of the statute, and § 371 was not mentioned in the indictment. Rather, the present prosecution was based on a conspiracy to violate the provisions of 21 U.S.C. §§ 952(a) and 960(a)(1), which statutes were identified in the indictment. In connection therewith, 21 U.S.C. § 963 provides that a person who conspires to commit any offense described in that subchapter is punishable by imprisonment or fine, or both, which may not exceed the maximum punishment prescribed for the offense which was the object of the conspiracy.

Judgment affirmed, without prejudice to McCoy's filing of a motion to correct or reduce sentence with the trial court under Fed. R. Crim. P. 35, if she be so inclined.

APPENDIX B

MARCH TERM — April 17, 1978

Before The Honorable Oliver Seth, Circuit Judge
The Honorable Jean S. Breitenstein, Circuit Judge
The Honorable William J. Holloway, Jr., Circuit Judge
The Honorable Robert H. McWilliams, Circuit Judge
The Honorable James E. Barrett, Circuit Judge
The Honorable William E. Doyle, Circuit Judge
The Honorable Monroe G. McKay, Circuit Judge
The Honorable James K. Logan, Circuit Judge

No. 77-1468

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

HELENA GUTERMAN McCOY,

Defendant-Appellant.

This matter comes on for consideration of appellant's petition for rehearing with suggestion for rehearing en banc in the captioned case and motion to file petition.

Upon consideration whereof, appellant's motion to file petition is granted. The petition for rehearing is denied by Circuit Judges McWilliams, Breitenstein and Doyle.

The petition for rehearing having been denied by the original panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

HOWARD K. PHILLIPS
Clerk
By *Robert L. Hoecker*
Robert L. Hoecker
Chief Deputy Clerk

APPENDIX C

MAY TERM — May 10, 1978

Before The Honorable Robert H. McWilliams,
The Honorable Jean S. Breitenstein,
The Honorable William E. Doyle, Circuit Judges

No. 77-1468
(D.C. No. 76 181 CR)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

HELENA GUTERMAN McCOY,

Defendant-Appellant.

This matter comes on for consideration of appellant's motion for stay of mittimus in the captioned case.

Upon consideration whereof, the Court orders the mandate issued April 25, 1978, in the captioned case, recalled and stayed for 30 days, until June 9, 1978, pending certiorari, and that if on or before that date there is filed with the Clerk of the Court of Appeals a notice from the Clerk of the Supreme Court of the United States that appellant has timely filed a petition for writ of certiorari in the Supreme Court, the stay shall continue until final disposition by the Supreme Court.

The Clerk shall forward a certified copy of this Order to the United States District Court for the District of New Mexico and to the parties of record.

HOWARD K. PHILLIPS, Clerk
By *Robert L. Hoecker*
Robert L. Hoecker
Chief Deputy Clerk